Supreme Court, U.S.
FILED

(1)

NO. 931553 APR 1 1994

IN THE OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

October Term, 1993

HENRY BOYD, JR., Petitioner,

v.

AARON GOOLSBY, TALMADGE FINCH, GEORGE ERVING, UNITED STATES OF AMERICA, FARMERS HOME ADMINISTRATION, and UNITED STATES DEPARTMENT OF AGRICULTURE, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANNY LAMPLEY
Post Office Box 7245
Tupelo, MS 38802-7245
(601) 840-4006

Attorney for Petitioner

99pp

QUESTION PRESENTED

1. Where a debtor, subsequent to the foreclosure of a trust deed secured by his home, has proposed a Chapter 13 re-organization plan curing his default and the bankruptcy court has entered an order of confirmation in the absence of any objection by the creditor, and the creditor did not appeal from the order of confirmation pursuant to Bankruptcy Rule 8002(a) and (c), is the creditor bound by the res judicata effect of the confirmation order pursuant to 11 USC Section 1327?

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NO. _____

October Term, 1993

IN THE SUPREME COURT OF THE UNITED STATES

HENRY BOYD, JR. PETITIONER

VS.

AARON GOOLSBY, TALMADGE FINCH, GEORGE ERVING, UNITED STATES OF AMERICA, FARMERS HOME ADMINISTRATION, and UNITED STATES DEPARTMENT OF AGRICULTURE RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Henry Boyd, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court for the Fifth Circuit entered in this proceeding on January 6, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals, rendered upon January 6, 1994, appears in the Appendix attached hereto at A-1. Other opinions and orders appear as

follows: Order of May 11, 1993 affirming U.S. Bankruptcy Court orders, A-7; Memorandum Opinion Affirming Bankruptcy Court filed May 6, 1993, A-9; Agreed Order directing Trustee to retain funds and continue to collect payments from debtor, October 8, 1993, A-24; Order Overruling Debtor's Objection to Order Entered in Contempt Proceedings, January 24, 1991, A-26; Order denying motion for contempt citation, July 5, 1990, A-29; Order granting motion for summary judgment, April 10, 1990, A-31; Order Denying Motion for Reconsideration, November 30, 1989, A-43; Order dismissing counterclaim, October 13, 1989, A-45; Order Confirming the Debtor's Plan, February 24, 1989, A-54; Debtor's Chapter 13 Plan, A-64.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 6, 1994. This petition for certiorari

was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 USC Section 1254(1).

STATUTES AND RULES INVOLVED

Bankruptcy Code, 11 USC Section 1327:

Effect of Confirmation.
(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Bankruptcy Rule 8002: text set forth in Appendix at A-67.

Bankruptcy Code 11 USC Section 1306: text set forth in Appendix at A-70.

11 USC Section 101:
(5) "claim" means--
(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

STATEMENT OF THE CASE

In 1977, the debtor Henry Boyd, Jr., received from FmHA a loan and executed a promissory note secured by his residence. He later defaulted on the loan. In March, 1986, FmHA conducted a foreclosure sale in which FmHA was the only bidder. Boyd challenged the foreclosure in federal district court. FmHA counterclaimed for eviction. The district court dismissed Boyd's complaint and granted the eviction. On November 30, 1988, the Fifth Circuit Court of Appeals affirmed in its decision reported in 861 F.2d 106.

On December 16, 1988, Boyd filed a Chapter 13 bankruptcy petition and plan. [A-64]. The bankruptcy court had jurisdiction to entertain the petition pursuant to 28 USC Section 1334, 28 USC Section 151 and 11 USC Section 301. At that time Boyd was still residing in the property. Boyd claimed the property as an exempt

asset of the estate and in his plan provided for FmHA's lien and proposed to retain possession of the property and to cure the arrearage of $1,337.00 by the payment of the monthly mortgage amount of $155.00 plus an additional $80.34 per month for 24 months. The plan was confirmed [A-54] without objection from FmHA on February 24, 1989 (though FmHA had notice of the proceedings) and within the 90 days available to Boyd to file a Petition for Writ of Certiorari in the U.S. Supreme Court to review the above-noted decision of the Fifth Circuit had he so chose. FmHA did not file a proof of claim or appeal from the order of confirmation.

On February 27, 1989, FmHA filed a motion for abandonment and for relief from the automatic stay. On June 26, 1989, FmHA filed an adversary proceeding for rent. The bankruptcy court granted the

motion pursuant to the prepetition rulings of the district court and Court of Appeals and rendered summary judgment for FmHA in the adversary proceeding. On September 5, 1989, Boyd was evicted from the property and as a result he filed a motion for contempt against FmHA because of its violation of the order of confirmation and the automatic stay provisions of 11 USC Section 362(c)(2)(c). The Bankruptcy Court dismissed Boyd's motion. On September 8, 1989, FmHA filed a Motion to Dismiss the bankruptcy case which was summarily denied from the bench on November 23, 1989.

Boyd appealed to the district court and then to the Fifth Circuit Court of Appeals both of which affirmed. To this day, the order of confirmation has not been set aside or revoked and the Chapter 13 Trustee is still withholding $235.00 per month from Boyd's paycheck even though Boyd completed the plan requirements in

February, 1991, or more than three years ago.

REASONS FOR GRANTING THE WRIT

1. The decisions of the courts below conflict with U.S. Supreme Court decisions.

The finality of a confirmation order is not subject to collateral attack. A creditor desiring to litigate its claims must advance its claims prior to entry of the order of confirmation and from an adverse decision take a timely appeal. **Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938).**

Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality. **Taylor v. Freeland & Kronz, 503 U.S. _____, _____, 112 S.Ct. 1644, 1648, 118 L.Ed.2d 280, 287 (1992).** In this case, though the issue concerns the finality of an order of confirmation rather than the propriety of an exemption, the analogy

holds: regardless of the colorable statutory basis for proposing to cure a default on a mortgage after foreclosure, the creditor should have objected to the plan and then appealed from an adverse decision. The creditor may not collaterally attack the bankruptcy court's confirmation order.

Boyd was a debtor in possession of the property at the time of confirmation. The eviction had not yet taken place. FmHA had both a claim against the real property for its value and a claim against Boyd even if the personal claim was no more than a right to remove him from the premises. **See, 11 USC Section 101(5).** Boyd had a claim against FmHA inasmuch as the questions litigated in the foreclosure case were not finally settled at the time he chose to forego further action in this Court but rather chose to propose a cure in bankruptcy. In addition,

at the time of confirmation and since, the creditor never evidenced its intent to forego a suit for any deficiency on the mortgage. The mortgage lien held by FmHA was subject to inclusion in an approved Chapter 13 reorganization plan. **Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 2152, 115 L.Ed.2d 66, 73 (1991).**

2. The decision of the Fifth Circuit not only conflicts with the decisions of other U.S. Circuit Courts of Appeal but also with previous precedent in the Fifth Circuit.

FmHA did not file an appeal from the order of confirmation as required by Rule 8002. That rule states that an appeal must be filed within ten (10) days of the entry of the confirmation order. This period of time is not advisory but mandatory. In the absence of an appeal the bankruptcy court was barred by the res judicata effect of the confirmation order from

entertaining FmHA's motion for abandonment and to lift the automatic stay; the reviewing courts were barred from affirming the bankruptcy court's decision but should have reversed and remanded the action for a determination of damages due Boyd as a result of the violation of 11 USC Section 1327 and 11 USC Section 362(c)(2).

In **Matter of Arbuckle, 988 F.2d 29 (5th Cir. 1993)**, the bankruptcy court granted trustee's application to approve settlement of a state court action brought by the debtor against creditors. The debtor appealed and the district court for the Northern District of Mississippi dismissed the debtor's appeal on the motion of the creditor for the reason that the notice of appeal was untimely. The debtor appealed to the Fifth Circuit Court of Appeals which affirmed and held that the District Court lacked jurisdiction to hear the appeal

because the notice of appeal was untimely filed; thus, allowing the bankruptcy court order to stand. "The district court did not reach this issue and neither do we. 'If the district court did not have jurisdiction to review the merits, then this court does not have jurisdiction to consider the merits on appeal.' In re Ramsey, 612 F.2d 1220, 1222 (9th Cir. 1980)." **Arbuckle, 988 F.2d at 32.**

The District Court lacked jurisdiction of an appeal that was not timely filed. **Matter of Robinson, 640 F.2d 737, 738 (5th Cir. 1981).** In this case, the creditor did not file an appeal at all.

In the case of **U.S. Dept. of the Air Force v. Carolina Parachute Corp., 907 F.2d 1469 (4th Cir. 1990)**, the debtor corporation filed a Chapter 11 reorganization plan and the government attempted to terminate certain executory contracts. The issues were: 1) whether a bankruptcy

court order confirming a reorganization plan is res judicata to a party who, although on notice of the proceeding, neither makes an objection to the proposed plan or appeals the order of confirmation; 2) whether the automatic stay terminates upon confirmation of a reorganization plan; and 3) whether the bankruptcy court had jurisdiction to enjoin the government from interfering with the reorganization plan. The Fourth Circuit held that the bankruptcy court order confirming the reorganization plan was res judicata as to the government where although it had notice it neither made objection nor appealed the order of confirmation. **Carolina Parachute, 907 F.2d at 1473.** The Court further rejected the government's contention that the bankruptcy court did not have jurisdiction to enjoin the government from interfering with the reorganization plan. **Carolina**

Parachute, 907 F.2d at 1474. [Note that a Chapter 13 case differs from a Chapter 11 case regarding the application of the automatic stay--compare 11 USC Section 1141(d) with 11 USC Sections 1327 and 1328].

A creditor cannot choose to collaterally attack an order of confirmation after having buried its head in the sand and stubbornly ignoring bankruptcy proceedings. **Matter of Pence, 905 F.2d 1107, 1109-10 (7th Cir. 1990)(citing Matter of Sam, 894 F.2d 778 (5th Cir. 1990)**(tort claim barred by bankruptcy discharge where claimant knew of bankruptcy case and could have taken action to protect its rights).

The case of **In re Szostek, 886 F.2d 1405 (3rd Cir. 1989)** relied heavily upon what had been heretofore well-established Fifth Circuit law as well as the law of other Circuits. Regardless of whether a

provision is inconsistent with bankruptcy laws or within the authority of the bankruptcy court, if it is nonetheless included in the plan and the plan is confirmed without objection, nor an appeal taken, the plan is not reviewable on its merits. **Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987). (See also Neely v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987)**(adopted by **Szostek** for the proposition that the failure of a creditor to timely file an objection time-bars the objection). The failure to raise an objection, or to appeal from a confirmation order, should preclude an attack on the plan or any provision therein as being illegal in a subsequent proceeding. **Matter of Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983).** In the case of **In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988)**, a non-objecting creditor was deemed to have

accepted a Chapter 11 plan; the general rule is that the acceptance of the plan can be inferred by the absence of an objection. **Ruti-Sweetwater, 836 F.2d at 1266.**

Similarly, confirmation of a Chapter 13 plan bars secured creditors from seeking relief from an automatic stay absent a postconfirmation default in carrying out the plan even though creditors had objected to, accepted, or rejected the plan. **In re Evans, 30 B.R. 530, 531 (9th Cir. 1983).** An order confirming a Chapter 13 plan is res judicata as to all justiciable issues which were or could have been decided at the confirmation hearing. **Evans, 30 B.R. at 531.** Absent evidence of fraud, once a debtor's plan has been confirmed the plan cannot be modified by a creditor. **In re Fietz, 852 F.2d 455 (9th Cir. 1988).**

Despite the creditor's contention that

Boyd had no legal or equitable rights remaining in the property and thus it could not have been property of the estate, the creditor never raised this contention in the bankruptcy court prior to confirmation. At any rate, the question of his right to propose the plan should not only have been settled by this Court's decision in **Johnson** but is also answered by decisions such as **In re Atlantic Business and Community Corp., 901 F. 2d 325, 328 (3rd Cir. 1990)**(a Chapter 11 debtor's tenancy at sufferance is property of the bankruptcy estate subject to the protection of the automatic stay).

3. The decisions below so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The lower Courts have blithely accepted the creditor's argument that the automatic stay could be lifted and

the property abandoned and the confirmed plan ignored without explaining what to do with the res judicata order of confirmation. The result is that the creditor has been permitted to collaterally attack the plan and to take Boyd's home though the plan has never been appealed, revoked, modified, or otherwise set aside. As stated, the Trustee now holds funds paid by Boyd pursuant to the plan which are not only sufficient to pay the plan out but in fact have continued to accumulate well past the scheduled end date of the plan of February, 1991.

While the creditor has relied heavily upon state law for the proposition that Boyd had no legal or equitable rights remaining in the property, FmHA must explain why this contention was not brought before the bankruptcy court in the proper manner prior to confirmation of the plan. The Fifth Circuit opinion

states that Boyd contended that the property revested in him free and clear of FmHA's liens. Boyd has contended that the property is exempt but has never sought to avoid the lien; rather, he provided for the lien in his confirmed plan. It is not a matter of magic, as the Fifth Circuit contends, that the plan of confirmation would revest property that is said to never have been property of the estate; the magic is in how the lower courts can simultaneously confirm a plan providing for a creditor's lien while at the same time allow the creditor to ignore the plan. Unless it is illegal to propose to cure a default and to pay a valid debt, and unless it is illegal for a creditor to accept such a proposal or to accept payment of a valid debt, the creditor in this case has in fact, willingly or unwillingly, accepted the plan proposed by Boyd. Even

if the property was not property of the estate prior to acceptance of the plan, the creditor allowed it to become property of the estate at confirmation. **See 11 USC Section 1306.**

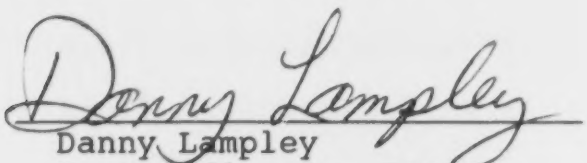
The decisions of the lower court do not conform with well-established law in the Fifth Circuit, other Circuits, and this Court regarding the effect of res judicata judgments, or the failure of a party to appeal an adverse decision.

CONCLUSION

In the absence of an objection or an appeal, the creditor was bound by the plan and the bankruptcy court, district court, and the Fifth Circuit Court of Appeals was without jurisdiction to consider any matter in connection with the bankruptcy case but the fact that there was and still is an operating, confirmed plan, and thus the lower courts should have remanded the case to the bankruptcy

court with instructions to enforce the order of confirmation. For the foregoing reasons this Court should issue a writ of certiorari to the Fifth Circuit Court of Appeals in order to review the judgment and opinions of the lower courts.

Respectfully Submitted,



Danny Lampley
Post Office Box 7245
Tupelo, MS 38802-7245
(601) 840-4006

Attorney for Petitioner

Dated: March 31, **1994.**

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HENRY BOYD, JR., Petitioner,

v.

AARON GOOLSBY, TALMADGE FINCH, GEORGE ERVING, UNITED STATES OF AMERICA, FARMERS HOME ADMINISTRATION, and UNITED STATES DEPARTMENT OF AGRICULTURE, Respondents.

CERTIFICATE OF SERVICE

I, Danny Lampley, Attorney of Record for the Petitioner Henry Boyd, Jr., do hereby certify that I have this day served by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari, and the accompanying Appendix upon the following persons in the following manner:

> Three (3) copies upon the Honorable Robert P. Crutcher, Asst. U.S. Attorney & Attorney for each of the Respondents, at his regular mailing address:

P.O. Drawer 886
Oxford, MS 38655
(601) 234-3351;

One (1) copy to each of the following:

United States of America
Farmers Home Administration
440-1 U.S. Hwy 78 West
Holly Springs, MS 38635

Honorable Harold J. Barkley, Jr.
Attorney for Chapter 13 Trustee
P.O. Box 4476
Jackson, MS 39296-4476

Honorable Ronald H. McAlpin
Asst. U.S. Trustee
Suite 808, Federal Bldg.
100 West Capitol Street
Jackson, MS 39269

Honorable Jerry W. Robertson
U.S. Dept. of Agriculture
Office of General Counsel
Suite 335, Federal Bldg.
100 West Capitol Street
Jackson, MS 39269

Solicitor General
Department of Justice
Washington, D.C. 20530

This the 31st day of March, 1994.

Danny Lampley

Danny Lampley
Attorney for Petitioner
P.O. Box 7245
Tupelo, MS 38802-7245
(601) 840-4006

In The Matter of Henry BOYD, Jr., Debtor.

Henry BOYD, Jr., Appellant,

v.

UNITED STATES of America/FMHA, Appellee.

No. 93-7366

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Jan. 6, 1994.

[Synopsis, Syllabi and Key Number Classification Omitted]

Appeal from the United States District Court for the Northern District of Mississippi.

Before DAVIS, JONES, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

BACKGROUND

In conjunction with a loan received from Farmers Home Administration ("FmHA"), Henry Boyd, Jr.(sic) executed a promissory note secured by his residence (the

"Property"). Boyd later defaulted on the loan. In March 1986, FmHA conducted a foreclosure sale where FmHA was the only bidder. Boyd challenged the foreclosure in district court. FmHA counterclaimed for eviction. The district court dismissed Boyd's complaint and granted the eviction. In November 1988, this court affirmed, 861 F.2d 106.

In December 1988, Boyd filed a Chapter 13 bankruptcy petition and plan listing FmHA as the only creditor. The plan claimed the Property as an exempt asset of Boyd's estate. The plan also provided for monthly mortgage payments to FmHA. Without objection, the bankruptcy court confirmed the plan.

Shortly after the confirmation, FmHA filed a motion for abandonment and for relief from automatic stay. The bankruptcy court granted FmHA's motion, 107 B.R. 541. Pursuant to the relief from

stay and order from the district court, Boyd was evicted from the Property. FmHA also filed adversary proceedings to recover rent. Boyd counterclaimed that the foreclosure should be set aside. The bankruptcy court dismissed Boyd's counterclaim and entered summary judgment awarding rent to FmHA. Later, Boyd filed a motion to hold FmHA in contempt for violating the automatic stay. The bankruptcy court dismissed his motion.

Boyd appealed the following orders of the bankruptcy court to the district court: (1) the order striking his counterclaim; (2) the order denying his motion for reconsideration of the counterclaim; (3) the summary judgment order awarding rent to FmHA; (4) the order dismissing his contempt motion; (5) and the order overruling his objection to the dismissal of his contempt motion. The district court affirmed, and so do we.

DISCUSSION

[1] Boyd contends that because the confirmation order was entered by the bankruptcy court without objection, the Property has revested in him free and clear of liens and FmHA is bound by the plan. Boyd further posits that because the plan was confirmed, the bankruptcy court had no jurisdiction to grant FmHA's motion for abandonment and relief from automatic stay or to hear FmHA's adversary proceeding to recover rent. We are not persuaded by this reasoning.

[2] Although the plan was confirmed without objection, a plan confirmation cannot magically revest Boyd with property that was never property of Boyd's bankruptcy estate. Under §541(a) of the Bankruptcy Code property of the debtor's estate includes "all legal and equitable interest of the debtor in property as of

the commencement of the case." "The nature of the debtor's interest in property which accrues to the estate is based on nonbankruptcy law." **Matter of Pinetree, Ltd., 876 F.2d 34, 36 (5th Cir. 1989).** In this case, Mississippi law provides that a valid foreclosure cuts off the mortgagor's right of "redemption and any other rights in and to the property (all of which are transferred to the foreclosure sale proceeds), with the sole exception of rights perfected prior to the filing of the deed of trust under which the foreclosure sale is held." **Peoples Bank & Trust Co. v. L & T Developers, Inc., 434 So.2d 699, 708 (Miss. 1983).**

[3] Boyd filed his Chapter 13 petition thirty-three months after the foreclosure sale had been concluded and the trustee's deed had been recorded. On the date Boyd filed for bankruptcy he had no legal

rights in the Property. His equitable rights, if any, were extinguished by the district court's eviction order, which was affirmed by this Court. Having no viable interest in the property at the time the Chapter 13 petition was filed, Boyd conveyed nothing to his bankruptcy estate.

Boyd's second contention is that FmHA should be held in contempt because it violated the automatic stay by filing a motion for abandonment and relief from automatic stay, by evicting Boyd from the Property, and by filing an adversary peoceeding seeking to recover rent. This argument is without merit because the bankruptcy court granted FmHA relief from the automatic stay.

For the foregoing reasons the decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

IN RE: HENRY BOYD, JR. PLAINTIFF/
APPELLANT

VERSUS CASE NO. WC90-103-S

AARON GOOLSBY, TALMADGE
FINCH, GEORGE ERVING,
UNITED STATES OF AMERICA,
FARMERS HOME ADMINISTRATION,
UNITED STATES DEPARTMENT
OF AGRICULTURE DEFENDANT/
APPELLEES

ORDER

In accordance with a Memorandum Opinion this day rendered in the above cause, the court hereby orders:

That the orders appealed from the United States Bankruptcy Court for the Northern District of Mississippi which were signed by Judge David Houston, III and entered on October 13, 1989, November 30, 1989, April 10, 1990, July 5, 1990, and January 24, 1991, are affirmed.

SO ORDERED, this the 4th day of May, 1993.

s/ L.T. SENTER, JR.
CHIEF JUDGE

Entered: May 11, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

IN RE: HENRY BOYD, JR. PLAINTIFF/
APPELLANT

VERSUS CASE NO. WC90-103-S

AARON GOOLSBY, TALMADGE
FINCH, GEORGE ERVING,
UNITED STATES OF AMERICA
FARMERS HOME ADMINISTRATION
UNITED STATES DEPARTMENT
OF AGRICULTURE DEFENDANTS/
APPELLEES

MEMORANDUM OPINION AFFIRMING
BANKRUPTCY COURT

This cause of action is before the court on the appeal of five orders of the Honorable David W. Houston, III, United States Bankruptcy Judge for the Northern District of Mississippi, entered October 13, 1989, November 30, 1989, April 10, 1990, July 5, 1990, and January 24, 1991.

A. Facts[fn 1]

In conjunction with a loan received

fn. 1. Finding no clear error, the Court sets forth the facts as stated in United States Bankruptcy Judge David

Houston, III's opinion of April 9, 1990.

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received from defendant/appellees/creditor, Farmers Home Administration (hereinafter referred to as "FmHA"), the plaintiff/appellant/debtor, Henry Boyd, Jr., (hereinafter referred to as "debtor"), executed a promissory note in 1977, wherein he agreed to repay the principal and interest to FmHA through monthly installments of $155.00. As security for the note, the debtor executed a deed of trust in favor of FmHA on his residential real property located in Marshall County, Mississippi.

The debtor subsequently defaulted under the promissory note. FmHA accelerated the debt and made demand for payment, notice of which was received by the debtor in September, 1985. On March 10, 1986, a foreclosure sale was conducted where FmHA was the sole bidder. The

trustee's deed granting title to FmHA was filed for record with the Chancery Clerk of Marshall County on March 19, 1986.

Subsequent to the completion of the foreclosure, the debtor filed a complaint to set aside the foreclosure in the United States District Court of the Northern District of Mississippi. A counterclaim for eviction was pled by FmHA. On December 29, 1986, a default judgment on the counterclaim was entered against the debtor. Conditioned on the debtor contining to make monthly rental and interest payments, the default judgment was set aside by a separate order of the District Court on January 6, 1987.

In December, 1987, pursuant to a motion for summary judgment, an order was entered which dismissed FmHA from the case, and, except for a Constitutional Fifth Amendment due process claim, dismissed all

counts of the complaint. The suit continued against certain named FmHA officials in their individual capacities and on the eviction counterclaim. The case came to a conclusion in April, 1988, when an order was entered dismissing the remaining claims of the complaint and granting judgment in favor of FmHA on its counterclaim for eviction. The debtor appealed the decision of the District Court to the United States Court of Appeals for the Fifth Circuit. By judgment dated November 30, 1988, the Fifth Circuit affirmed the order of the District Court.

The debtor filed a Chapter 13 bankruptcy petition and plan on December 16, 1988, listing FmHA as the only creditor. The plan provided for mortgage payments of $155.00 per month to FmHA as well as $80.34 per month to cure the pre-petition arrearage of $1337.00. Notice of the filing of the petition was mailed to FmHA

advising that the meeting of creditors would be held on January 24, 1989, and that the bar date for objection to confirmation of the plan was February 10, 1989. No objection or claim was made by FmHA as to the proposed plan. The bankruptcy court confirmed the plan on February 24, 1989. On February 27, 1989, FmHA filed a motion requesting relief from the automatic stay to collect rent. FmHA filed a complaint on June 26, 1989, to recover money and property. On September 8, 1989, the bankruptcy court granted FmHA's motion for relief from the automatic stay. The next day the debtor was evicted from the subject property.

The debtor has properly perfected an appeal on the following five orders: First, an order entered on October 13, 1989, striking the debtor's counterclaim, which was based on the theory that the foreclosure was a fraudulent transfer

voidable under 11 U.S.C. § 548(a)(2); second, an order dated November 30, 1989, denying the debtor's motion for reconsideration of the October 11th order; third, a summary judgment order entered on April 10, 1990, for FmHA awarding rent against the debtor; fourth, an order entered July 5, 1990, dismissing the debtor's motion to hold FmHA in contempt for violating the automatic stay in connection with the eviction; and, fifth, an order entered January 24, 1991, overruling debtor's objection to dismissal of his motion for contempt.

B. Jurisdiction and Standard of Review

Pursuant to 28 U.S.C. § 158(a) this court sits as an appellate court for the United States Bankruptcy Court for the Northern District of Mississippi. Findings of fact are reviewed under the clearly erroneous standard. See Bankruptcy Rules 8013. "[The District Court]

may review freely [the Bankruptcy] court's conclusions of law." Matter of Waller Creek, LTD., 867 F.2d 228, 232 (5th Cir. 1989). Questions of law are reviewed de novo.

C. Discussion

Property of the debtor's estate includes "...all legal and equitable interests of the debtor in property as of the commencement of case." 11 U.S.C. § 541(a)(1). The Bankruptcy Code defines the property of a debtor's estate broadly in order to "...obtain the maximum possible recovery for and equitable distribution among creditors." Matter of Pinetree, LTD., 876 F.2d 34, 36 (5th Cir. 1989). "Bankruptcy law does not create property, however." Id. The Tenth Circuit set forth the legally obvious reading of 11 U.S.C. § 541 in In re Thompson, 894 F.2d 1227 (10th Cir. 1990).

At the very least, a mortgage

> debtor must have some legal or equitable interest in property which enters the bankruptcy estate if he hopes to retain it through the bankruptcy cure provisons. No court has held that debtors can use the bankruptcy cure provisions to recover property in which they no longer have any interest under state law.

Id. 894 F.2d at 1229 (internal citation omitted).

"The nature of the debtor's interest in property which accrues to the estate is based on nonbankruptcy law." Matter of Pinetree, LTD., 876 F.2d at 36. Unlike some states, Mississippi does not provide for redemption after a foreclosure sale has occurred. See, Miss.C.Ann. § 89-1-53 et seq. The Bankruptcy Court correctly stated:

> Under Mississippi law, a valid foreclosure cuts off the mortgagor's rights of redemption and "any other rights in and to the property (all of which are transferred to the foreclosure sale proceeds), with the sole exception of rights perfected prior to the filing of the deed of trust under which the foreclosure sale

is held."

In re Boyd, 107 Bankr. 541, 542 (Bkrtcy. N.D. Miss. 1989) (quoting Peoples Bank & Trust Co. v. L & T Developers, 434 So.2d 699, 708 (Miss. 1983). Having no viable interest in the subject property at the time of filing the chapter 13 petition, the debtor conveyed nothing to the bankruptcy estate.

The debtor contents(sic) that since FmHA failed to object to the plan, and since the plan was confirmed by the bankruptcy court, then 11 U.S.C. § 1327 renders the subject property "free and clear of any claim or interest...". 11 U.S.C. § 1327. "By Section 541 (a)(1) the estate [is] vested with the same interest in the collateral that the debtor had, ... [ ]. The question arises whether, by virtue of Section 1327(c), the debtor receives a greater interest than the estate had, in that the property is no longer subject

to any liens." In re Honaker, 4 Bankr. 415, 416-17 (Bkrtcy. E.D. Mich. 1980).

> The reading of Section 1327 urged by [the debtor] would have the Debtor materially improve his financial position, by unemcumbering [secured] assets, through the simple expedient of passing his property through the estate. This result has little to recommend it.

Id., 4 Bankr. at 417. also see In re Levine, 45 Bankr. 333 (Bkrtcy. N.D. Ill. 1984) (bank's lien on chapter 13 debtor's automobile remained intact, entitling bank to proceeds of vehicle's sale, although bank failed to file timely proof of claim against debtor's automobile, and notwithstanding confirmation of plan). FmHA's failure to file a claim or objections to the plan is not fatal to the interest it legally received through the foreclosure.

Since the debtor chose not to appeal the decision of Fifth Circuit Court of

Appeals which affirmed Judge Glen Davidson's opinion uphoding FmHA's foreclosure of the debtor's property, this court is precluded from questioning the foreclosure procedure. The Fifth Circuit's decision is res judicata to the issues raised by the debtor pertaining to the legitimacy of the foreclosure, the fair market value of the property in comparision to the foreclosure bid, the unpaid accrued rent, and the theory that the foreclosure is faudulent. See, Boyd v. United States, 861 F.2d 106 (5th Cir. 1988). Since the issues addressed in the first three orders on appeal are res judicata due to the Fifth Circuit's ruling, those orders of Bankruptcy Judge David W. Houston, III are affirmed.

Section 1322(b) of the Bankruptcy Code provides in part that a chapter 13 plan may,

(2) modify the rights of holders

> of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims...
>
> * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

Id., (emphasis added). In Grubbs v.Houston First American Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984) (applying Texas property law), the debtor's home mortgage was accelerated and judicial foreclosure proceedings were begun by the creditor. Beyond the issue sub judice, the Grubbs court interpreted 11 U.S.C. § 1322(b)(5) to allow a debtor to schedule an accelerated mortgage through a chapter 13 petition. Pertinent to this court's consideration, the Grubbs court stated:

> The courts interpreting this provision are in general agreement that a proposed plan may cure a pre-petition default if the debt has not been accelerated prior to filing of a chapter 13 petition and that an accelerated debt may not be cured if it has actually resulted in a foreclosure sale to a third party.

Id. at 240 (footnote omitted). Although the Circuit Courts are divided on whether § 1322(b) allows modifications of mortgages, no court of appeal has allowed a default to be cured after a foreclosure sale. See Matter of Roach, 824 F.2d 1370 (3rd Cir. 1987); In re Glenn, 760 F.2d 1428, 1442 (6th Cir. 1985) ("Once the property has been sold, the right to cure the default and reinstate the terms of the mortgage under section 1322(b) ceases."); In re Tynan, 773 F.2d 177 (7th Cir. 1985); Justice v. Valley National Bank, 849 F.2d 1078 (8th Cir. 1988); In re Mann Farms, Inc., 917 F.2d 1210 (9th Cir. 1990). In light of the

aforementioned, the debtor's appeals of the final two orders are without merit, and they are affirmed.

Once the debtor's home had properly been foreclosed upon, as was determined by the Fifth Circuit, the filing of the chapter 13 petition conveys no interest, under Mississippi law, to the bankruptcy estate. Except for those interests acquired prior to the mortgage, a proper forclosure terminates all interest a mortgagor/debtor has in the subject property. The failure of FmHA to object to the debtor's chapter 13 plan, in no way revests the debtor with any equitable interest in the home. Finding no reversible error, and for the foregoing reasons, the five appealed orders of the United States Bankruptcy Court for the Northern District of Mississippi are affirmed.

An order in accordance with this opinion shall issue.

This the 4th day of May, 1993.

s/ L.T. Senter, Jr.
CHIEF JUDGE

Entered: May 11, 1993.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN THE MATTER OF:	**CHPATER 13 NO:**
HENRY S. BOYD	88-42545

AGREED ORDER

THIS CAUSE came on for hearing on September 27, 1993, on Trustee's Motion for Direction and Debtor's Response, after notice and opportunity for hearing, and the Court, being fully advised in the premises, does hereby find and Order as follows:

THAT, the Trustee's Motion for Direction is well-taken.

THAT, the Trustee is hereby directed to retain all funds on hand, and to continue to collect payments from the Debtor at the rate of $235.00 per month.

THAT, the Trustee shall retain and collect funds until an Order has been entered by the Fifth Circuit Court of Appeals in a matter styled Henry Boyd

Jr., Plaintiff Appellant vs. Aaron R. Goolsby, et al, Defendant United States of America/FmHA, Defendant Appellee, bearing Case No. 93-7366, and upon further Order of this Court.

SO ORDERED this the 7th day of October, 1993.

s/ David W. Houston, III
DAVID W. HOUSTON, III
U.S. BANKRUPTCY JUDGE

APPROVED:

s/ Harold Barkley, Jr.
HAROLD J. BARKLEY, JR.
ATTORNEY FOR TRUSTEE
MSB# 2008

s/ Clencie L. Cotton
CLENCIE COTTON
DEBTOR'S ATTORNEY

Entered: October 8, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

HENRY BOYD, JR. Bankruptcy No. 88-42545-WTH

ORDER OVERRULING DEBTOR'S OBJECTION TO ORDER ENTERED IN CONTEMPT PROCEEDINGS

There came on for consideration on December 4, 1990, in chambers of the Court at the Federal Building in the City of Oxford, Mississippi, a certain "Motion To Strike Combined Designation of Items To Be Included In The Record On Appeal And Statement of Issues To Be Presented and Related Objection", filed by the United States of America on behalf of its agency, Farmers Home Administration, U.S. Department of Agriculture. The Court has considered the Memorandum of United States in support of such Motion, as well as oral arguments by Mr. Boyd and the United States, through counsel.

For good cause shown, the Court now

finds:

(1) Said "Debtors' objection to Order entered in contempt proceedings", is not well-taken and should be overruled.

(2) There is no jurisdiction for this Court to entertain such an objection, since there has been no order of contempt rendered by this Court, within the purview of Bankruptcy Rule 9020(c); rather Mr. Boyd's "Motion For Contempt For Violation of the Automatic Stay and Order of Confirmation" was not granted, but was denied fully by Order of this Court, after notice and hearing, such Order having been rendered on June 15, and entered July 5, 1990, dismissing this Motion against Mr. Boyd(sic).

(3) Mr. Boyd's appeal from said Order last mentioned, otherwise has been perfected by a "Notice of Appeal", identified by Certificate of Service dated July 12, 1990. Further, pursuant to this

Notice last mentioned, the Clerk for this Court has issued, bearing date of July 16, 1990, a certain "Notice of Filing of A Filing of A Notice of Appeal."

Therefore, the Court now Orders that said "Debtors' Objection To Order Entered In Contempt Proceedings" be, and the same is hereby overruled and dismissed accordingly. This Order grants partially the relief requested by this present Motion. The remainder of the relief requested by such present MOtion(sic) will be considered and determined by subsequent Order, or Orders, to be rendered herein.

So Ordered and Adjudged this 24th day of January, 1991.

s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

Entered: January 24, 1991

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

HENRY BOYD, JR.
DEBTOR

CHAPTER 13
BANKRUPTCY NO. 88-42545

ORDER

There came on to be considered on June 12, 1990, Debtor's "Motion for Contempt Violation of the Automatic of the Automatic(sic) Stay and Order of Confirmation", seeking (among other relief) to hold in contempt of court those named as respondents, being:

"...Aaron Goolsby, Talmadge Finch, George Erving and United States of America, Farmers Home Administration, United States Department of Agriculture..."

The Court heard arguments by counsel, including the citation of authorities, and considered its previous Orders.

The Court is pursuaded that none of

the relief sought by this Motion is well taken, and that all of same should be denied.

Therefore, it is the order of this Court that Debtor's said Motion be, and the same is hereby, dismissed against him.

So ORDERED and ADJUDGED, this 15th day of June, 1990.

s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

Entered: July 5, 1990

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: HENRY BOYD, JR.
CASE NO. 88-42545-WTH

UNITED STATES OF AMERICA,
FARMERS HOME ADMINISTRATION
UNITED STATES DEPARTMENT OF
AGRICULTURE PLAINTIFF

VERSUS ADV. NO. 89-4108

HENRY BOYD, JR., AND
LOCKE D. BARKLEY,
CHAPTER 13 TRUSTEE DEFENDANTS

ORDER

On consideration of the motion for summary judgment filed by the plaintiff, the United States of America acting on behalf of its agency, Farmers Home Administration, United States Department of Agriculture, hereinafter referred to as plaintiff or FmHA; response to said motion having been filed by the debtor, Henry Boyd, Jr., hereinafter referred to as defendant, debtor, or Boyd; no response having been filed by the defend-

ant, Locke D. Barkley, Chapter 13 trustee; and the Court having reviewed motion, response, supporting exhibits and affidavits, hereby finds, orders, and adjudicates as follows, to-wit:

I.

The Court has jurisdiction of the subject matter of and the parties to this adversary proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A) (B) and (I).

II.

In connection with a loan received from FmHA on February 4, 1977, the debtor executed a promissory note which was payable in monthly installments of $155.00. As security for the note, he executed a deed of trust in favor of FmHA encumbering his residential real property, a house located in Marshall County, Mississippi. The debtor subsequently defaulted

under the promissory note. FmHA accelerated the debt and demanded payment. On March 10, 1986, a foreclosure sale was conducted and FmHA, the sole bidder, successfully acquired the property through a duly executed trustee's deed, recorded March 19, 1986.

The debtor filed a complaint to set aside the foreclosure in the United States District Court for the Northern District of Mississippi. A counterclaim for eviction was filed by FmHA. Pursuant to a motion for summary judgment, an order was entered dismissing FmHA from the case, as well as, dismissing all counts of the debtor's complaint except a Fifth Amendment due process claim against certain named FmHA officials in their individual capacities. The case came to a conclusion in April, 1988, when an order was entered dismissing the remaining claims of the complaint and

granting judgment in favor of FmHA on its counterclaim for eviction.

The debtor appealed the decision of the District Court to the United States Court of Appeals for the Fifth Circuit. In connection therewith, the District Court entered an order on May 6, 1988, for supersedeas of judgment, conditioned on the debtor making monthly payments to FmHA for his continued use of the property. The Court's order directed the debtor to:

> "...pay to the Clerk of [the] Court,...a monthly amount of two hundred fifty-eight and no/100 ($258.00) dollars, for the continued possession, use and enjoyment of the subject real estate, for the month of May, 1988 and for each month thereafter, commencing not later than May 23, 1988, then continuing on the first day of June, 1988, and serially upon the first day of each month thereafter,..."

The Fifth Circuit affirmed the District Court decision by a judgment dated November 30, 1988.

The debtor filed a chapter 13 bankruptcy petition and plan on December 16, 1988, listing FmHA as the only creditor. The plan proposed to pay the regular mortgage payments of $155.00 per month to FmHA, as well as, $80.34 per month to cure the pre-petition arrearage of $1337.00. FmHA did not object to the plan, and an order of confirmation was entered.

On June 23, 1989, FmHA filed an adversary complaint in this Court seeking recovery of the payments ordered by the District Court. The debtor filed a Rule 12(b)(6) motion to dismiss, which was later withdrawn.

On August 23, 1989, the debtor filed an amended answer to the complaint and a counterclaim seeking to set aside the March 10, 1989, foreclosure pursuant to 11 U.S.C. §548(a)(2), and §522(h). Following the consideration of a motion for

summary judgment filed by FmHA, the counterclaim was dismissed with prejudice as being untimely. The debtor has appealed this decision.

The present motion for summary judgment filed by FmHA states that no genuine issues of fact remain in dispute. As such, FmHA asserts that prepetition and postpetition payments, totaling $3,190.00, are owed by the debtor for his use of the subject property.

III.

In response to FmHA's motion for summary judgment, the debtor contends that the following are material issues of fact still in dispute:

> (1) "Whether or not the adversary complaint of [the] plaintiff should be dismissed for failure to state a cause of action...
>
> (2) Whether or not the debtor is entitled to have the transfer of his property set aside as a fraudulent conveyance pursuant to [11 U.S.C.] §548 of the Bankruptcy Code...

(3) Whether or not...[FmHA] paid reasonable equivalent value at the time of the nonjudicial foreclosure of the debtor's property...and

(4) Whether or not...[FmHA] serviced the debtor's loan and conducted the foreclosure in accordance with the rules, regulations, instructions and requirements of the Farmers Home Administration."

The Court will address each of the purported issues raised by the debtor. Although paragraph (1) does not assert a legitimate contested issue of fact, the debtor, as mentioned above, has previously withdrawn his Rule 12(b)(6) motion to dismiss, candidly admitting that the complaint on its face states a viable cause of action.

The court also dismissed earlier the debtor's counterclaim, brought under the provisions of 11 U.S.C. §548(a)(2) and §522(h), which sought to set aside FmHA's foreclosure as a "fraudulent" transfer. This dismissal is dispositive of the issues raised by the debtor in paragraphs

(2) and (3).

In regard to the issues raised by the debtor in paragraph (4), this Court is of the opinion that these matters have previously been fully litigated in the District Court and the Fifth Circuit Court of Appeals. Regardless, these issues are not germane to the present lawsuit. The instant adversary proceeding is specifically related to the collection of payments required by the District Court in its order for supersedeas of judgment dated May 6, 1988. FmHA's loan servicing and foreclosure practices have no bearing whatsoever on the requirements set forth in the District Court order.

Having reviewed all of the purported disputed issues of fact raised by the debtor, the Court is of the opinion that none are material to the disposition of FmHA's motion for summary judgment.

IV.

Summary judgment should only be granted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must present its basis for the motion after which the non-moving party then has a duty to present enough evidence to create a factual dispute. Celotex v. Catrett Corp., 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986).

It is not the function of this Court to weigh the evidence and determine its credibility, but to decide whether there is a genuine issue for trial. "... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 at 255, 106 S.Ct. 2505, 91 L.Ed. 2d 202 at 216 (1986).

The Court must, however, determine if the factual issues are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessay will not be counted." Id. at 248, 106 S.Ct. 2520, 91 L.Ed. 2d at 211.

V.

The genesis of FmHA's motion for summary judgment, as mentioned earlier, is the District Court's order for supersedeas of judgment which directed the debtor to pay to FmHA $258.00 each month for his continued use of the subject property. These payments were to commence May 23, 1988, and were to continue monthly thereafter as long as the debtor occupied the premises. The debtor candidly admits in his response to the motion for summary judgment that he made no payments to FmHA

after August 8, 1988. Therefore, the pre-petition payments due for September, October, November, and the first sixteen days of December, 1988, would total $907.00. The postpetition payments began to accrue on December 17, 1988, the day after the debtor filed his bankruptcy petition, and ran through September 11, 1989, the day of his eviction. They would total $2,283.00. The sum of the two figures is $3,190.00. As a result of the debtor's admission, there is no dispute, in the opinion of the Court, that these amounts are owed. Consequently, the motion for summary judgment filed by FmHA is well taken.

It Is, Therefore, Ordered and Adjudged that FmHA is awarded judgment against the debtor in the total sum of $3,190.00 to be allocated in this bankruptcy case as follows:

A. $907.00 is to be considered an

allowed prepetition unsecured claim pursuant to 11 U.S.C. §502(a).

B. $2,283.00 is to be considered an allowed postpetition administrative expense claim pursuant to 11 U.S.C. §503(b).

This Order will effectively conclude the above captioned adversary proceeding. However, other outstanding matters in this bankruptcy case will be addressed when appropriate pleadings are filed.

ORDERED and ADJUDGED this the 9th day of April, 1990.

s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

Entered: April 10, 1990

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE: BANKRUPTCY NO. 88-42545-WTH

HENRY BOYD, JR.

UNITED STATES OF AMERICA, FARMERS HOME ADMINISTRATION UNITED STATES DEPARTMENT OF AGRICULTURE — PLAINTIFF

VS. ADV. NO. 89-4108

HENRY BOYD, JR. and LOCKE D. BARKLEY — DEFENDANTS

ORDER DENYING MOTION FOR RECONSIDERATION

There came on for consideration on the 28th day of November, 1989, the Motion for Reconsideration filed by the Defendant, Henry Boyd, Jr., and the Response thereto of the United States of America on behalf of its agency, Farmers Home Administration. Both Plaintiff and the Defendant Boyd, through counsel presented argument in support of their respective positions. The Court did then and does now find that the transfer of the subject residential property did occur, not upon

the conclusion of the eviction of the Defendant Boyd on or about September 11, 1989; rather upon the recording of the Trustee's Deed, the same having been filed for record on March 19, 1986, pursuant to foreclosure sale conducted on March 10, 1986.

Therefore, the Court's Order rendered October 11 and entered October 13, 1989, should not be vacated or amended, rather should remain in full force and effect. The Motion of the Defendant Boyd, accordingly, is denied.

So ORDERED and ADJUDGED, this 30th day of November, 1989.

s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

Entered: November 30, 1989

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: HENRY BOYD, JR. CASE NO. 88-42545

UNITED STATES OF AMERICA,
FARMERS HOME ADMINISTRATION,
UNITED STATES DEPARTMENT OF
AGRICULTURE PLAINTIFF

VERSUS ADV. NO. 89-4108

HENRY BOYD, JR. and
LOCKE D. BARKLEY, CHAPTER 13
TRUSTEE DEFENDANTS

ORDER

On consideration of the motion to strike the defendant/debtor's answer and counterclaim, said motion having been filed by the plaintiff, United States of America on behalf of its agency, Farmers Home Administration, United States Department of Agriculture, hereinafter FmHA; response to said motion having been filed by the debtor/defendant, Henry Boyd, Jr., hereinafter debtor or Boyd; and the Court having considered same, hereby finds, orders, and adjudicates as follows, to-

wit:

I.

The Court has jurisdiction of the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (C), (I), and (O).

II.

In 1977, in connection with a loan received from FmHA, the debtor executed a promissory note wherein he agreed to repay the principal and interest to FmHA through monthly installments of $155.00. As security for the note, the debtor executed a deed of trust in favor of FmHA on his residential real property, a house located in Marshall County, Mississippi. The debtor subsequently defaulted under the promissory note. FmHA accelerated the debt and made demand for payment, notice of which was received by the debtor in

September, 1985. On March 10, 1986, a foreclosure sale was conducted where FmHA was the sole bidder. The trustee's deed was filed for record with the Chancery Clerk of Marshall County on March, 19 1986.

Subsequent to the completion of the foreclosure, the debtor filed a complaint to set aside the foreclosure in the United States District Court for the Northern District of Mississippi. A counterclaim for eviction was filed by FmHA. On December 29, 1986, a default judgment on the counterclaim was entered against the debtor. The following month, on January 6, 1987, the default judgment was set aside by a separate order of the District Court, conditioned on the debtor's continuing to make monthly rental and interest payments.

In December, 1987, pursuant to a motion for summary judgment, an order was

entered which dismissed FmHA from the case, as well as, dismissed all counts of the complaint except a Constitutional Fifth Amendment due process claim. The suit was allowed to continue against cer-named FmHA officials in their individual capacities and on the eviction counter-claim. The case came to a conclusion in April, 1988, when an order was entered dismissing the remaining claims of the complaint and granting judgment in favor of FmHA on its counterclaim for eviction. The debtor appealed the decision of the District Court to the United States Court of Appeals for the Fifth circuit. By judgment dated November 30, 1988, the Fifth Circuit affirmed.

The debtor filed a Chapter 13 bank-ruptcy petition and plan on December 16, 1988, listing FmHA as the only creditor. The plan provides for mortgage payments of $155.00 to FmHA, as well as, $80.34

per month to cure the pre-petition arrearage of $1337.00.

III.

On June 26, 1989, FmHA filed a complaint against the debtor for the recovery of both pre-petition and post-peti- rental obligations, as well as, for a determination that the said rental oligations are non-dischargeable in this bankruptcy case. The debtor filed an answer to the complaint and a counterclaim alleging that the foreclosure conducted by FmHA was a fraudulent transfer as contemplated by 11 U.S.C. §548(a)(2), avoidable by the debtor pursuant to 11 U.S.C. §522 (h). For reference purposes, both of these sections are set forth hereinbelow:

11 U.S.C. Section §548(a)(2):

(a)The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily- (emphasis added)

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii)was engaged in business or a or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii)intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. §522(h):

(h)The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if-

(1)such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title [11 U.S.C. §544, 545, 547, 548, 549, or 724(a)] or recoverable by the trustee under section 553 of this title [11 U.S.C. §553]; and

(2) the trustee does not attempt to avoid such transfer.

FmHA has filed its motion to strike the counterclaim pursuant to Rule 12(b), Federal Rules of Civil Procedure. In the memorandum brief supporting its motion, FmHA correctly alleges that the debtor filed his Chapter 13 bankruptcy petition thirty-three months after the foreclosure sale had been concluded and the trustee's deed had been recorded. As such, FmHA contends that 11 U.S.C. §548(a) is inapplicable to this proceeding since it specifically limits the cause of action to transfers that were made or incurred within one year before the date of the filing of the petition. The Court concurs with FmHA that the cause of action stated in the debtor's counterclaim is statutorily barred by the explicit language of 11 U.S.C. §548(a), and, as such, the counterclaim is not well taken.

Although it is not necessary for the disposition of the instant motion, the

Court would observe that it is doubtful that the debtor, standing alone, could bring this cause of action due to the fact that 11 U.S.C. §522(h) is inapplicable to this proceeding because of the debtor's inability to claim an exemption in the property pursuant to 11 U.S.C. §522(g)(1). This, of course, would not preclude the trustee from bringing this cause of action if the filing of the bankruptcy petition were timely.

The Court would also observe that the debtor's counterclaim does not seek relief pursuant to 11 U.S.C. §544(b).

IV.

The Court is, therefore, of the opinion that the foreclosure which was conducted and completed by FmHA more than one year prior to the time that the debtor filed his bankruptcy case does not fall within the purview of 11 U.S.C. §548(a). As such, the motion filed by

FmHA is well taken and shall be sustained.

As a result of this decision, the motion of the debtor to amend becomes moot and is hereby overruled.

It Is, Therefore, Ordered and Adjudged that the counterclaim filed by the debtor seeking to avoid the foreclosure conducted by FmHA as a fraudulent transfer pursuant to 11 U.S.C. §548(a)(2) is not well taken and said counterclaim is hereby dismissed with prejudice.

This Order shall be considered a final judgment as contemplated by Rule 9021, Federal Rules of Bankruptcy Procedure, and Rule 58, Federal Rules of Civil Procedure.

ORDERED and ADJUDGED this the 11th day of October, 1989.

s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

Entered: October 13, 1989

United States Bankruptcy Court

IN RE: **Case No. 88-42545**

HENRY BOYD, JR.

Debtor.

ORDER CONFIRMING THE DEBTOR'S PLAN, AWARDING A FEE TO THE DEBTOR'S ATTORNEY AND RELATED ORDERS

Following the meeting of creditors held pursuant to 11 U.S.C. 341 at which the debtor appeared in person to be examined by creditors and other interested parties, a hearing was held pursuant to 11 U.S.C. 1324 at which the trustee appeared in person and the debtor appeared by his attorneys Clencie L. Cotton ;

Continuances, if any, were: NONE ;

Other Appearances were: NONE ;

The debtor is hereinafter referred to in the masculine singular, even though this be a joint case or the debtor be female. All references to "Rules" shall be interpreted as referring to the Bankruptcy Rules unless the context indicates otherwise.

At such hearing the following objections to confirmation were considered:

At the hearing the court considered the matters presented by the trustee, counsel for the debtor and by other interested parties, if any, and upon the pleadings and statements of parties and of counsel, and on the evidence presented, the court finds that:

A. Written notice of the meeting of creditors held pursuant to 11 U.S.C. 341 and on this hearing on the confirmation of the plan was given as required by Rule 2002;

B. The plan as presented for confirmation (hereinafter referred to as "the plan") complies with the provisions of Chapter 13 of Title 11 of the United States Code and the other applicable provisions of said title;

C. Any fee, charges or other amount required under Chapter 123 of Title 28, or by the plan, to be paid before confirma-

tion has been paid;

D. The plan has been proposed in good faith and not by any means forbidden by law;

E. The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of Title 11 of the United States Code on such date; and

F. With respect to each allowed secured claim provided for by the plan, the holder of such claim either accepted, or was deemed to have accepted, the plan or in the alternative--

a. (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

b. the plan proposes to surrender the property securing such claim to the creditor.

G. If the trustee or the holder of an allowed unsecured claim objected to the confirmation of the plan, then the court finds that

a. the value of the property to be distributed under the plan on account of such unsecured claim is not less than the amount of such claim or

b. the plan provides that all of the debtor's projected disposable income, [as 'disposable

income' is defined in 11 U.S.C. 1325(b)(2)] to be received by the debtor in the three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

IT IS ORDERED THAT:

1. The debtor's plan is confirmed and (if appropriate) for cause shown, payments for a period not to exceed five years is approved.
2. The debtor, or his employer, shall make the payments to the trustee required by the plan as confirmed or as hereafter modified. If the debtor does not cause such timely payments to be made, the trustee shall order [per Section 542(b)] or request the Court to order [pursuant to Section 1326(c)] any entity

from whom the debtor receives income to pay all or any part of such income to the trustee.

3. The debtor shall, when practicable, obtain the approval of the trustee prior to incurring addtional consumer debt. The failure to obtain such approval if practicable, may cause the claim for debt to be unallowable to the creditor, [11 U.S.C. 1305(c)] and the debt to be nondischargeable for the debtor [11 U.S.C. 1328(d)].

4. The trustee shall:

(a) Keep a detailed record of all receipts, including the source or other identification of each receipt, and of all disbursements [11 U.S.C. 1302(b)(1)]; and

(b) File with the Court, or if applicable, with the entity providing addressing service for the Court

and the Trustee, notices of creditor's address changes brought to the attention of the Trustee. [Rule 2002(g)]; and

(c) Deposit all funds received by the trustee under the plan with an entity which provides insurance, guaranties or deposits in the manner prescribed by 11 U.S.C. 345.

5. Pursuant to 11 U.S.C. 1326 the order of payment, unless otherwise directed, shall be:

(a) Any unpaid claim of the kind specified in Section 507(a)(1) of Title 11 U.S.C.;

(b) The percentage fee fixed for the trustee pursuant to Section 1302 (e) of said title (or Section 586 (e)(1) of Title 28, if applicable);

(c) Creditors whose claims are timely filed and allowed in such amounts

and order of preference as may be provided by the plan or as may be required to provide adequate protection of the interest of any entity with an interest in property of the esstate(sic).

6. The Trustee, the debtor and the attorney for the debtor shall examine proofs of claim, or summaries thereof, and shall object to the allowance of improper claims as provided by 11 U.S.C. 704(4).

7. The Trustee shall at least once each six months file with the Court a report showing the funds received and the disbursements made by him since the date of the last report, and shall upon completion of the plan file with the Court a final report and account containing or incorporating by reference a detailed statement of receipts and

disbursements [Rule 13-208(5)]. (sic)

8. Ninety days after the final distribution, the trustee shall stop payment of all checks then unpaid and file with the Clerk of the Court a list of the names and addresses, so far as known, of the persons entitled to such payments and the amounts thereof. The unclaimed funds shall be paid into the Court and disposed of under Chapter 129 of Title 28. [11 U.S.C. 347 and Rule 3001].

ALLOWANCE OF ATTORNEY'S FEES.

The application by the attorney for the debtor for the allowance of reasonable compensation as authorized by 11 U.S.C. 329 having been considered, the court finds that a reasonable fee for the services performed and undertaken by such attorney is $__-0-__ of which $__-0-__

was paid to such attorney prior to the filing of the petition initiating this proceeding.

The balance of such fee ($ -0-) shall be paid by the trustee from the monies received under the debtor's plan provided, however, that such payments shall be deferred in time to payments, if any, which may be required to provide adequate protection of the interest of the holders of any secured claims.

s/ David W. Houston, III
Feb. 24 1989 Bankruptcy Judge

Approved:

s/ Clencie L. Cotton
Attorney for the Debtor

Entered: February 24, 1989

CHAPTER 13 PLAN

CASE NO._____

DEBTORS: Henry Boyd, Jr.

S.S.# 427-78-3624

NET MONTHLY EARNINGS 1000.00

_____

S.S.#_____

NET MONTHLY EARNINGS _____

ADDRESS: 459 College Avenue Holly Springs, MS 38635 NO. OF DEPENDENTS Dvorced w/2 ch.-- pays 229.00/mo. ch. suppo

PLAN PAYMENTS:
Debtor (s) propose to pay $235.34 per Month. Wage Order to be directed to:
N. MS Rural Legal Services
Post Office Box 767
Oxford, MS 38635
or directly to the debtor because:

_____
_____
_____

PRIORITY CREDITORS:
IRS: -0- @$ -0- per mth STATE TAX COMM. $ -0- @$ -0- per mth OTHER: -0-- -0- @ $ -0- per mth

HOME MORTGAGE:
Mtg. pmts to Farmers Home Admin. beginning 1/1/89 @ $155.00 (X) PLAN ( ) OUTSIDE

Mtg. pmts to _____ beginning ____
@ $_____ ( ) PLAN ( ) OUTSIDE

Mtg. pmts to _____ beginning ____
@ $_____ ( ) PLAN ( ) OUTSIDE

Mtg. arrearage to Farmers Home Admin.
From 12/1/ 84 To 1/17/85 $1337.00
@ $80.34 per mth

Mtg. Arrearage to _____ From _____
To _____ $_____ @ ____ per mth

Mtg. Arrearage to _____ From _____
To _____ $_____ @ ____ per mth

SECURED CLAIMS: (Retain lien under 11 U.S.C. 1325(a)(5)(B)(i) and to be paid as follows:

	CLAIM	VALUE	AMT TO BE PAID	PAY PROP
None	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____
_____	$_____	$_____	$_____	$_____

SPECIAL CLAIMANTS: Child Support, co-signed debts, collateral for surrender or abandonment, etc.

	CLAIM	PROPOSAL
None	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

UNSECURED DEBTS: The holders of the allowed unsecured claims are to be paid indeferred(sic) payments as follows:
( )In Full ( )PER Cent ( ) None ( )
Other -0-

ADMINISTRATIVE: Pay Filing fees, administrative fees pursuant to Court Order and/or Local Rules.

ATTORNEY FEES OF $ -0- To be paid through the plan.

The debtor (s) request that the Court

approve this plan for 24 months.

Date: 12/14/88

Debtor's Signature s/ Henry Boyd, Jr.

Spouse's Signature _____

ATTORNEY FOR DEBTOR:

Clencie L. Cotton
Post Office Box 297
Holly Springs, MS 38635

ATTORNEY PHONE NO. 601-252-2278

s/ Clencie L. Cotton
ATTORNEY'S SIGNATURE

BANKRUPTCY RULE 8002

TIME FOR FILING NOTICE OF APPEAL

(a) **Ten-Day Period.** The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note

thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) Effect of Motion on Time for Appeal. If a timely motion is filed by any party: (1) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) under Rule 9023 to alter or amend the judgment; or (3) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

(c) Extension of Time for Appeal. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

BANKRUPTCY CODE 11 U.S.C. § 1306

Property of the estate.

(a) Property of the estate includes, in addition to the property specified in section 541 of this title--

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan, the debtor shall remain in possession of all property of the estate.